Petition

81-1585

No.

Office - Supreme Court, U.S.
FILED
FEB 24 1982
ALEXANDER L. STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

HOLMES LIMESTONE CO., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

DIRK D. SNEL
LAURA FROSSARD
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the judicial review provision in Section 526(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. III) 1276(a)(1), permits a suit challenging national regulations issued under the Act to be brought only in the United States District Court for the District of Columbia.

2. Whether such a suit may be brought more than sixty days after the promulgation of the challenged regulation.*

---

* The plaintiffs below were Holmes Limestone Co. and the Ohio Mining and Reclamation Association. Defendants below were Cecil B. Andrus, Secretary of the Interior, the United States Department of the Interior, and Walter Heine, Director, Office of Surface Mining Reclamation and Enforcement, United States Department of Interior. Because Secretary Watt is the successor to Secretary Andrus and James R. Harris is the successor to Walter Heine, we have substituted Secretary Watt and James R. Harris as the federal parties in this case, pursuant to Rule 40.3 of the Rules of this Court.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	3
Reasons for granting the petition	8
Conclusion	15
Appendix A	1a
Appendix B	23a
Appendix C	25a
Appendix D	26a

TABLE OF AUTHORITIES

Cases:

Abbott Laboratories v. *Gardner*, 387 U.S. 136.....7, 12, 13
Adamo Wrecking Co. v. *United States*, 434 U.S. 275 ..... 14, 15
Gardner v. *Alabama Department of Pensions & Security*, 385 F.2d 804, cert. denied, 389 U.S. 1046.. 11
Getty Oil Co. v. *Ruckelshaus*, 467 F.2d 349, cert. denied, 409 U.S. 1125 11
Hodel v. *Indiana*, 452 U.S. 314 11
Hodel v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 .....4, 8, 11
National Coal Operators Association v. *Kleppe*, 423 U.S. 388 12
Permanent Surface Mining Regulation Litigation, In re, 14 E.R.C. 1083 8-9
Permanent Surface Mining Regulation Litigation, In re, 15 E.R.C. 1802 9
Reading Anthracite v. *Office of Surface Mining Reclamation & Enforcement*, No. 80-0667 (Oct. 8, 1980) 9

Cases—Continued Page

Surface Mining Regulation Litigation, In re, 456 F. Supp. 1301, rev'd in part, 627 F.2d 1346 ..... 8, 14
Trailmobile Co. v. *Whirls*, 331 U.S. 40 12
Tug Valley Recovery Center v. *Watt*, No. 81-2096 (Feb. 4, 1982) 14
Union Carbide Corp. v. *Andrus*, 13 E.R.C. 1481..... 9
Whitney National Bank v. *Bank of New Orleans*, 379 U.S. 411 11
Yakus v. *United States*, 321 U.S. 414 ..... 14, 15

Constitution, statutes and regulations:

United States Constitution, Article I, Section 8..... 15
Clean Air Act, 42 U.S.C. (& Supp. III) 1857 *et seq.*:
42 U.S.C. 1857h-5(b) 15
42 U.S.C. (Supp. III) 7607(b)(1) 13
Consumer Product Safety Act, 15 U.S.C. 2060 14
Federal Water Pollution Control Act, 33 U.S.C. 1369(b)(1) 14
Securities Exchange Act of 1934, 15 U.S.C. 78y..... 14
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. III) 1201 *et seq.* 4, 8, 15
Section 101(g), 30 U.S.C. (Supp. III) 1201 (g) 8
Section 502(c), 30 U.S.C. (Supp. III) 1252 (c) 4
Section 502(e), 30 U.S.C. (Supp. III) 1252 (e) 4, 6
Section 503, 30 U.S.C. (Supp. III) 1253 5
Section 522(e), 30 U.S.C. (Supp. III) 1272 (e) 3, 4
Section 522(e)(5), 30 U.S.C. (Supp. III) 1272 (e)(5) 3, 4, 5, 6, 11
Section 526(a)(1), 30 U.S.C. (Supp. III) 1276 (a)(1) 2, 3, 6, 7, 9, 10, 11, 12, 13, 14
Voting Rights Act of 1965, 42 U.S.C. 1973c 13
21 U.S.C. 371(f)(6) 13
30 C.F.R.:
Section 701.1(3) 5
Section 761.5 ..... 6, 13
Section 761.5(d) 3, 5

Constitution, statutes and regulations—Continued Page

42 Fed. Reg. 62693 (1977) 5
44 Fed. Reg. (1979):
p. 13316 5
p. 14902 5
p. 77445 5
45 Fed. Reg. 64962 (1980) 4

Miscellaneous:

118 Cong. Rec. 35048 (1972) 11
123 Cong. Rec. 15575 (1977) 11
H.R. 2, 95th Cong., 1st Sess. (1977) 12
H.R. Rep. No. 95-218, 95th Cong., 1st Sess. (1977).. 10, 12
H.R. Rep. No. 95-493, 95th Cong., 1st Sess. (1977).. 12
Mining and Mineral Research Center: Hearings Before the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess. (1971) 10-11
Regulation on Surface Mining, Part I: Hearings Before the Subcomm. on the Environment and the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs, 93d Cong., 1st Sess. (1973) 11
S. 7, 95th Cong., 1st Sess. (1977) 12
S. Rep. No. 95-128, 95th Cong., 1st Sess. (1977).... 10, 12
Webster's Seventh New Collegiate Dictionary (1970) 10

In the Supreme Court of the United States

OCTOBER TERM, 1981

No.

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

HOLMES LIMESTONE CO., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior, the United States Department of the Interior, and the Director of the Office of Surface Mining Reclamation and Enforcement of the United States Department of the Interior, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-22a) is reported at 655 F. 2d 732. The opinion of the district court (App. D, *infra*, 26a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1981 (App. B, *infra*, 23a-24a), and

rehearing was denied on September 29, 1981 (App. C, *infra*, 25a) On December 17, 1981, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including February 26, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 526(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. III) 1276(a)(1), provides:

> Any action of the Secretary to approve or disapprove a State program or to prepare or promulgate a Federal program pursuant to this chapter shall be subject to judicial review by the United States District Court for the District which includes the capital of the State whose program is at issue. Any action by the Secretary promulgating national rules or regulations including standards pursuant to sections 1251, 1265, 1266 and 1273 of this title shall be subject to judicial review in the United States District Court for the District of Columbia Circuit. Any other action constituting rulemaking by the Secretary shall be subject to judicial review only by the United States District Court for the District in which the surface coal mining operation is located. Any action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law. A petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action, or after such date if the petition is based solely on grounds arising after the sixtieth day. Any such petition may be

made by any person who participated in the administrative proceedings and who is aggrieved by the action of the Secretary.

Section 522(e) of the Act, 30 U.S.C. (Supp. III) 1272(e) provides in pertinent part:

> After August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted—
>
> * * * * *
>
> (5) within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery.

Section 761.5(d) (30 C.F.R.) provides in pertinent part:

> For the purposes of this part:
>
> * * * * *
>
> *Cemetery* means any area of land where human bodies are interred.

STATEMENT

This action was brought by Holmes Limestone Co. and the Ohio Mining and Reclamation Association to challenge a regulation defining the term "cemetery" as used in Section 522(e)(5) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. III) 1272(e)(5). The United States District Court for the Northern District of Ohio dismissed the complaint for lack of jurisdiction, holding that the judicial review provision, Section 526(a)(1)

of the Act, 30 U.S.C. (Supp. III) 1276(a)(1), permitted such challenges to national regulations to be brought only in the United States District Court for the District of Columbia. The United States Court of Appeals for the Sixth Circuit reversed, and remanded the case for consideration of the merits.

1. The Surface Mining Control and Reclamation Act of 1977 (Surface Mining Act), 30 U.S.C. (Supp. III) 1201 *et seq.*, prohibits surface mining on certain federal lands, and within specified distances of roads, dwellings and certain other buildings, or parks (30 U.S.C. (Supp. III) 1272(e)). It also prohibits surface mining within 100 feet of a cemetery (30 U.S.C. (Supp. III) 1272(e)(5)). In areas where surface mining is permitted, the Act establishes performance standards to protect the environment, in a two-stage program. See *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 (1981). In the interim program stage, the Secretary of the Interior, acting through the Office of Surface Mining Reclamation and Enforcement (OSM), is the primary enforcement authority (Section 502(e) of the Act, 30 U.S.C. (Supp. III) 1252(e)). A state may continue to regulate surface mining in this stage, so long as the state issues mining permits that are consistent with federal interim program regulations, which implement certain performance standards specified in the Act (Section 502(c), 30 U.S.C. (Supp. III) 1252(c)). In the second stage, all the Act's performance standards must be enforced, either by the state, pursuant to a state program approved by OSM, or by OSM pursuant to a program implemented for a state without an approved program.[1]

---

[1] Ohio is operating under the interim program; its state program has not yet been approved. See 45 Fed. Reg. 64962 (1980).

In order to implement the Act, OSM first promulgated interim program regulations on December 13, 1977 (42 Fed. Reg. 62693). These regulations defined the applicable performance standards and specified procedures for their enforcement and for reimbursing the states for certain regulatory efforts in connection with the interim program. Thereafter, on March 13, 1979, OSM promulgated the complete regulatory program for the Surface Mining Act (44 Fed. Reg. 14902). The original interim program regulations were simply incorporated by reference as subchapter B. The newly promulgated regulations included permanent program regulations (subchapter C), defining the procedures by which a state may obtain approval of a state program to regulate surface mining operations within its boundaries, and identifying the performance standards that must be enforced by an approved state program (see Section 503 of the Act, 30 U.S.C. (Supp. III) 1253). The new regulations also identified, in subchapter F (44 Fed. Reg. 14903 (1979)), areas unsuitable for surface mining, including (in Part 761) areas identified by Congress in 30 U.S.C. (Supp. III) 1272(e)(5). As part of subchapter F, a cemetery is defined as "any area of land where human bodies are interred" (30 C.F.R. 761.5 (d)). In the March 13, 1979, filing, the permanent program regulations in subchapter C indicated that the subchapter F regulations apply to the permanent program (44 Fed. Reg. 15316; 30 C.F.R. 701.1(3)). On December 31, 1979, a conforming amendment provided that subchapter F also applies to the interim program (44 Fed. Reg. 77445).

2. Respondent Holmes Limestone entered into coal mining leases with two Amish farmers in 1979. The Amish bury their dead in family burial plots on their own farms. Both farmers agreed that Holmes could

surface mine up to 25 feet from the burial plots. Although the Ohio regulations, like the Act, prohibit surface mining within 100 feet of a cemetery, the Franklin County Court of Common Pleas determined that private burial plots were not cemeteries, and Holmes was issued state permits to mine to within 25 feet from the burial plots (App. A, *infra*, 8a-10a).[2]

Recognizing that this state permit was inconsistent with the OSM regulations, respondents Holmes Limestone and the Ohio Mining and Reclamation Association commenced this suit on June 6, 1980, in the United States District Court for the Northern District of Ohio, seeking a declaratory judgment that 30 C.F.R. 761.5 is arbitrary and inconsistent with the Act in including private burial plots within the definition of cemetery. They also claimed that, as applied, the Act effects an unconstitutional taking of property without just compensation and sought to enjoin enforcement against them of 30 U.S.C. (Supp. III) 1272 (e)(5) (App. A, *infra*, 11a).[3]

The district court found that it lacked jurisdiction to review the challenged regulation because the judicial review provision (Section 526(a)(1) of the Act, 30 U.S.C. (Supp. III) 1276(a)(1)), limits review of

---

[2] These permits were not stayed, and respondent has completed its mining operations on these two plots. The issue is not moot, however, because the company also has a number of additional coal mining leases with other Amish farmers who are willing to permit mining to within 25 feet of their burial plots. (App. A, *infra*, 16a).

[3] Five days later, pursuant to its primary enforcement responsibilities under Section 502(e) of the Act, 30 U.S.C. (Supp. III) 1252(e), OSM issued a notice of violation to respondent Holmes Limestone for mining within 100 feet of the cemetery on one of the plots (App. A, *infra*, 11a).

national regulations to the United States District Court for the District of Columbia (App. D, *infra*, 34a).[4]

3. The United States Court of Appeals for the Sixth Circuit reversed. The court held that Section 526(a)(1) permits review of challenges to national regulations in courts other than the United States District Court for the District of Columbia, reasoning that, while the statute provides that "other actions" may be brought "only" in the district court where the mining operation is located, in the final version of the bill the qualifying word "only" was deleted from the phrase that provides for review of national regulations in the District of Columbia (App. A, *infra*, 13a). The court also found that the Secretary's interpretation of Section 526(a)(1), which limits review to one district court, is inconsistent with the presumption of judicial review of administrative action, as expressed by this Court in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967) (App. A, *infra*, 13a-14a).

The court also concluded that there were "serious questions about the propriety" of the 60-day limitation upon the filing of petitions for judicial review of rulemaking actions.[5] The court observed that enforcement of the limitation should be eschewed "without clear statutory support therefor which is lacking here" (App. A, *infra*, 15a). After strongly suggest-

---

[4] The district court also rejected respondents' constitutional challenges to the Act as applied (App. D, *infra*, 34a-36a).

[5] Section 526(a)(1), 30 U.S.C. (Supp. III) 1276(a)(1) includes the requirement that "[a] petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action, or after such date if the petition is based solely on grounds arising after the sixtieth day."

ing that the Secretary's regulations relating to the cemetery limitation are arbitrary and capricious,[6] the court remanded the case to the district court for consideration of that issue.[7]

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals frustrates the congressional intent that the regulations implementing the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. III) 1201 *et seq.*, receive prompt and uniform judicial review, and thus jeopardizes a primary purpose of the Act: to require that all surface mining throughout the country comply with uniform minimum performance standards.[8] That concern remains serious even if we assume that other courts will respect the jurisdiction of the United States District Court for the District of Columbia insofar as it has already reviewed the regulations challenged in that forum.[9] First, certain of those

---

[6] Judge Merritt, concurring in the judgment, objected to the majority's discussion of the merits of the issue to be considered by the district court on remand (App. A, *infra*, 21a).

[7] The court of appeals majority found it unnecessary to reach respondents' constitutional claims. Judge Merritt agreed with the district court's conclusion that the Act as applied is constitutional (App. A, *infra*, 21a-22a).

[8] This uniformity of interpretation is not only important to OSM's efforts to enforce the Act; it also protects the states and the coal mine operators from the adverse effects of lax interpretations of the regulations in neighboring jurisdictions. Cf. Section 101(g), 30 U.S.C. (Supp. III) 1201(g); *Hodel* v. *Virginia Surface Mining & Reclamation Association, supra.*

[9] *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301, 1307 (D.D.C. 1978), rev'd in part, 627 F.2d 1346 (D.C. Cir. 1980) (interim program regulations); *In re Permanent*

regulations—like the "cemetery" definition at issue here—have not been attacked in the District of Columbia proceedings. And, more important, the Secretary is currently engaged in a significant revision of the regulations and anticipates substantial litigation when the revised regulations are promulgated. Accordingly, if the decision below is permitted to stand, there is a very real prospect of conflicting judicial interpretations of the Surface Mining Act resulting from decentralized review.[10] Before that disruptive eventuality materializes—inevitably calling for resolution of differing views by this Court—we ask the Court to confirm the limitation on judicial review imposed by the Act.[11]

1. The congressional desire to establish uniform national performance standards for the surface min-

---

Surface Mining Regulation Litigation, 14 E.R.C. 1083 (D.D.C. 1980) (Secretary has authority to require supplemental information in permit applications); *In re Permanent Surface Mining Regulation Litigation*, 15 E.R.C. 1802, 1814 (D.C. Cir. 1981) (aff'd en banc, noting "appellant is free to continue to contest the specific regulations in the district court).

[10] The reasoning of the court of appeals would also permit the review of the Secretary's approval or disapproval of a state plan in courts other than the single district court in each state specified in the Act, because the wording of this provision is identical to the jurisdictional limitation interpreted by the Court. Seven state programs, involving the major coal-producing states, are currently under consideration for approval by the Secretary.

[11] The only other courts to rule on this question have both held that Section 526(a)(1) provides for review of national regulations exclusively in the district court for the District of Columbia. *Reading Anthracite* v. *Office of Surface Mining, Reclamation and Enforcement*, No. 80-0667 (E.D. Pa. Oct. 8, 1980); *Union Carbide Corp.* v. *Andrus*, 13 E.R.C. 1481, 1489 (S.D. W.Va. 1979).

ing industry was an important factor in the enactment of the Surface Mining Control and Reclamation Act (S. Rep. No. 95-128, 95th Cong., 1st Sess. 49 (1977); H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 58 (1977)). That goal is reflected not only in the procedures for implementing the performance standards, but also in the judicial review provision. Thus, in Section 526(a)(1) of the Act (30 U.S.C. (Supp. III) 1276(a)(1)), Congress carefully identified the various types of regulatory activities of the Secretary, and provided that each type should be subject to centralized judicial review: regulations with a national impact in the District of Columbia district court, those with a statewide impact in the district court for the district of the capital of the state involved, and all other regulations only in the district where the particular surface mining operation involved is located. The court of appeals turned this careful legislative effort on its head by reading it to give centralized review in a single district court only to the Secretary's *least* significant regulatory actions, and to subject those with a national scope to the risk of conflicting interpretations in a variety of jurisdictions.[12]

---

[12] That risk is a very real one, as the opinion of the court below demonstrates. Congress reasonably sought to avoid precisely the sort of unsympathetic statutory interpretation reflected not only in the court's jurisdictional holding, but in its reaching out to suggest on the merits that the regulation defining a cemetery as "any area of land where human bodies are interred" is arbitrary and capricious (cf. App. A, *infra*, 21a).

Not only is the inclusion of private burial plots within the term "cemetery" entirely reasonable on its face (see, *e.g.*, *Webster's Seventh New Collegiate Dictionary* 134 (1970), it it also clearly consistent with the legislative history of the Act. See *Mining and Mineral Research Centers: Hearing Before*

The fact that Section 526(a)(1) does not expressly state that review of national regulations is to be *only* in the District of Columbia district court is not significant. Congress apparently relied on the "well settled [rule] that if Congress, as here, specifically designates a forum for judicial review of administrative action, that forum is exclusive. * * * And this result does not depend on Congress using the word 'exclusive' in the statute providing for a forum for judicial review." *Gardner* v. *Alabama Department of Pensions & Security*, 385 F.2d 804, 810 (5th Cir. 1967), cert. denied, 389 U.S. 1046 (1968) (citations omitted); *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d 349, 356 (3d Cir. 1972), cert. denied, 409 U.S. 1125 (1973); see also *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 422 (1965). The District of Columbia district court and the district court for the state capital are specifically identified, and thus exclusive. In order to avoid any possible doubt that jurisdiction over specific regulations is to be

---

the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess. 812 (1971); *Regulation on Surface Mining, Part I: Hearing Before the Subcomm. on the Environment and the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess. 783 (1973); 118 Cong. Rec. 35048 (1972) (remarks of Rep. Hechler); 123 Cong. Rec. 15575 (1977) (remarks of Sen. McClure). Moreover, contrary to the suggestion of the court of appeals (App. A, *infra*, 14a-15a), the Secretary's selection of 100 feet as the minimum distance for surface mining from a cemetery, and his refusal to permit a waiver of that provision, reflect precise statutory directions (30 U.S.C. (Supp. III) 1272(e)(5)), not arbitrary administrative regulation. Finally, the court's suggestion (App. A, *infra*, 15a) that protection of private burial plots exceeds congressional power under the Commerce Clause is inconsistent with this Court's decisions in *Hodel* v. *Virginia Surface Mining & Reclamation Association*, *supra*; and *Hodel* v. *Indiana*, 452 U.S. 314 (1981).

solely in the district court where the mine is located, the word "only" is used; it is simply not needed in the two prior clauses.

The court of appeals stressed that although both the House and Senate versions of the bill expressly provided that national regulations were to be reviewed only in the District of Columbia district court,[13] the word "only" was omitted from the final version of the bill reported out of the conference committee (App. A, *infra*, 13a). However, the conference committee's discussion of the changes made in the bill does not even mention this deletion. H.R. Rep. No. 95-493, 95th Cong., 1st Sess. 111 (1977). Committee changes in the language of a bill made without explanation are not a reliable guide to statutory interpretation. *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 61 (1947). Moreover, as this Court noted in *National Coal Operators Association* v. *Kleppe*, 423 U.S. 388, 401 n.10 (1976), "A Conference Committee does not have the authority to make changes on matters as to which both bills agree."

Finally, in relying on *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967) as authority for rejecting the district court's interpretation of Section 526(a)(1), the court of appeals has overlooked the crucial distinction between providing an exclusive forum for judicial review and providing no judicial review at all. In *Abbott Laboratories* this Court found that because there was a presumption of reviewability of administrative action, the mere fact that certain regulations were made reviewable did not, without more, support an inference than Congress intended to foreclose review of other regulations (387 U.S. at 140-

---

[13] See H.R. 2, 95th Cong., 1st Sess. § 526(a)(1) (1977), H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 46 (1977); S. 7, 95th Cong., 1st Sess. § 426(a)(1) (1977); S. Rep. No. 95-128, 95th Cong., 1st Sess. 41 (1977).

141). But unlike the interpretation of the review provision rejected by this Court in *Abbott Laboratories*, the district court's interpretation of Section 526(a)(1) does not cut off the challenged regulation from all review.[14] Section 526(a)(1) only restricts review of such regulations to a specific forum.[15]

2. The district court properly concluded that the only court with subject matter jurisdiction over respondents' challenge to the national regulation contained in 30 C.F.R. 761.5 was the United States District Court for the District of Columbia. It was therefore unnecessary for the court to consider whether respondents satisfied the timeliness requirement of Section 526(a)(1). Similarly, since the district court found it lacked jurisdiction, the issue of whether the suit was time-barred by the running of the 60-day limitation was not properly before the court of appeals and need not be decided by this Court. Nevertheless, because the court of appeals stated that this limitation raised "serious questions" and lacked "clear statutory support" (App. A, *infra*, 15a), we urge this Court to affirm the 60-day limitation on judicial re-

---

[14] Moreover, additional factors favoring judicial review were present in *Abbott Laboratories* that are not present in this case. There was a saving clause in the Act which provided that the statutory judicial review "shall be in addition to and not in substitution for any other remedies provided by law." 21 U.S.C. 371(f)(6). The legislative history of the Act showed that Congress considered judicial review of agency actions in excess of the agency's authority to be already available under the general equity powers of the courts. Congress added the special review provision to make sure that factual determinations of the agency could also be reviewed (387 U.S. at 142-143).

[15] Centralization of review jurisdiction is a common method of assuring national uniformity. See, *e.g.*, 42 U.S.C. 1973c (Voting Rights Act of 1965), and 42 U.S.C. (Supp. III) 7607(b)(1) (Clean Air Act).

view if it disagrees with our position on the first issue submitted.

The court of appeals did not explain why it found unclear the statutory direction that "[a] petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action, or after such date if the petition is based solely on grounds arising after the sixtieth day" (30 U.S.C. (Supp. III) 1276(a)(1).[16] The court to which Congress entrusted the responsibility for interpreting the requirement, the United States District Court for the District of Columbia, found no such lack of clarity (*In re Surface Mining Regulation Litigation*, *supra*, 456 F. Supp. at 1307; accord, *Tug Valley Recovery Center* v. *Watt*, No. 81-2096 (S.D. W. Va. Feb. 4, 1982)), and we are aware of none. Moreover, such requirements for prompt judicial review of agency action are not unusual. See *e.g.*, 33 U.S.C. 1369(b)(1) (Federal Water Pollution Control Act); 15 U.S.C. 78y (Securities Exchange Act of 1934); 15 U.S.C. 2060 (Consumer Product Safety Act). This Court held, in *Yakus* v. *United States*, 321 U.S. 414, 433 (1944), that due process was not denied by a limitation on review of emergency price control regulations to one court within 30 days of administrative denial of a protest that had to be filed within 60 days of the promulgation of the regulation. The Court recognized that the limitation of time for seeking judicial review results in a comprehensive and swift review of new regulations (321 U.S. at 432-433).[17] Ignoring

---

[16] There is no suggestion that the grounds on which respondents challenged the regulation arose more than 60 days after its promulgation.

[17] Justice Powell, concurring in *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 290 (1978), although "express-

the 60-day limitation would undercut the effectiveness of that effort by permitting piecemeal review of aspects of the regulations long after they would otherwise have become fully effective, binding guidelines upon which all concerned can rely.[18]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

DIRK D. SNEL
LAURA FROSSARD
Attorneys

FEBRUARY 1982

[ing] no considered judgment," suggested that "*Yakus* is at least arguably distinguishable" from *Adamo*, which involved the 30-day judicial review provision in the Clean Air Act, 42 U.S.C. 1857h-5(b), on the ground that *Yakus* may have been based on Congress' war powers under Article I, Section 8 of the United States Constitution. Justice Powell was evidently concerned that a 30-day review provision permits "precariously little time" for those affected to act. The 60-day provision here is, of course, less stringent. The Majority in *Adamo* assumed that *Yakus* would permit a similar restriction on judicial review in the Clean Air Act (434 U.S. at 278-279).

[18] That review of the permanent regulations issued under the Surface Mining Control and Reclamation Act of 1977 has been underway in the United States District Court for the District of Columbia for several years (see note 9, *supra*), merely highlights the importance of beginning the process promptly.

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 80-3666

HOLMES LIMESTONE CO., ET AL.,
PLAINTIFFS-APPELLANTS

v.

CECIL B. ANDRUS, ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Northern District of Ohio

Decided and Filed August 6, 1981

Before: WEICK and MERRITT, Circuit Judges and ENSLEN, U.S. District Judge.*

WEICK, Circuit Judge, delivered the opinion of the court, in which ENSLEN, U.S. District Judge, joined. MERRITT, Circuit Judge (pp. 15-19), delivered a separate opinion, concurring in the judgment.

WEICK, Circuit Judge. This appeal is from a judgment of the District Court for the Northern District

---

* The Honorable Richard A. Enslen, United States District Judge, Western District of Michigan, sitting by designation.

of Ohio, Eastern Division, dissolving a preliminary injunction which it had issued in favor of the appellants and then dismissing their complaint for declaratory and injunctive relief for lack of jurisdiction. In their complaint, the appellants had challenged the construction and application by the Secretary of Interior of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201, *et seq.* and Regulations with respect to appellants' mining operations on farms owned by Amish people near their private family burial plots which farms had been leased by them to appellant, Holmes Limestone, for the mining of coal in Holmes County, Ohio. Holmes Limestone contended that if said Act and Regulations were applicable and enforced in the manner attempted by the Secretary, this would constitute a taking of its property without due process of law in violation of the Fifth Amendment to the Constitution and would deprive it of the Equal Protection of the Laws in violation of the Fourteenth Amendment.[1]

After granting the preliminary injunction in favor of Holmes, the district court, when it completed hearing the case on its merits, reluctantly decided that it had no jurisdiction to hear appellants' case, holding that the United States District Court for the District of Columbia had exclusive jurisdiction to hear it. In our opinion, the district court erred in holding that it was without jurisdiction and should have heard and decided the case on its merits. We reverse and remand.

Jurisdiction of the court was based on 28 U.S.C. §§ 1331, 2201, 2202; 30 U.S.C. § 1276(a)(1) and vio-

---

[1] Ohio Mining and Reclamation Association is a trade association composed of coal miners in Ohio and in which Holmes is a member.

lations of the Fifth and Fourteenth Amendments to the Constitution.

I. Background

The Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201, *et seq.*, was enacted by the 95th Congress and signed into law on August 3, 1977. The Act provides a two-tiered system of regulation whereby an "interim" or "initial" program is to be followed by a system of permanent regulation.

Section 201 of the Act (30 U.S.C. § 1211) creates the Office of Surface Mining Reclamation and Enforcement (OSM) within the Department of the Interior. The Secretary of the Interior, through the OSM and its Director, is given the responsibility of administering and implementing the Act (30 U.S.C. § 1211(c)).

The Secretary is directed by 30 U.S.C. § 1251(a) to promulgate regulations governing the initial program and by § 1251(b) to promulgate the permanent regulatory program. Section 1251(a) directs the Secretary to promulgate the interim regulations "based on and incorporating the provisions set out in section 1252(c) of this title."

Section 1252 provides, in pertinent part:

> § 1252. Initial regulatory procedures—State regulation.
>
> (a) No person shall open or develop any new or previously mined or abandoned site for surface coal mining operations on lands on which such operations are regulated by a State unless such person has obtained a permit from the State's regulatory authority.

Interim Standards

(b) All surface coal mining operations on lands on which such operations are regulated by a State which commence operations pursuant to a permit issued on or after six months from August 3, 1977, shall comply, and such permits shall contain terms requiring compliance with the provisions set out in subsection (c) of this section. Prior to final disapproval of a State program or prior to promulgation of a Federal program or a Federal lands program pursuant to this chapter, a State may issue such permits.

Full compliance with environmental protection performance standards

(c) On and after nine months from August 3, 1977, all surface coal mining operations on lands on which such operations are regulated by a State shall comply with the provisions of subsections (b)(2), (b)(3), (b)(5), (b)(10), (b)(13), (b)(15), (b)(19), and (d) of section 1265 of this title or, where a surface coal mining operation will remove an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill by removing all of the overburden and creating a level plateau or a gently rolling contour with no high-walls remaining, such operations shall comply with the requirements of section 1265(c)(4) and (5) of this title without regard to the requirements of section 1265(b)(3) or 1265(d)(2) and (3) of this title, with respect to lands from which overburden and the coal seam being mined have not been removed. *Provided, however,* That surface coal mining operations in operation pursuant to

> a permit issued by a State before August 3, 1977, issued to a person as defined in section 1291(19) of this title in existence prior to May 2, 1977 and operated by a person whose total annual production of coal from surface and underground coal mining operations does not exceed one hundred thousand tons shall not be subject to the provisions of this subsection except with reference to the provision of section 1265(d)(1) of this title until January 1, 1979.

Section 1252(e) provides for a federal enforcement program which operates during the interim period; that period during which federal and state enforcement procedures are coexistant. Section 1252(e)(1) gives the Secretary enforcement power over the interim standards of subsections (b) and (c) of Section 1252. As noted in the portion of § 1252(c) set out above, the interim jointly administered programs must comply with § 1265(b)(2), (b)(3), (b)(5), (b)(10), (b)(15), (b)(19) and (d).

On December 13, 1977, the Secretary promulgated the interim regulations. (42 Fed. Reg. 62677) These regulations are contained in 30 C.F.R. Parts 710 through 725 (1980). By their own terms, based upon the statutory grants of authority, the regulations are effective until permanent programs are approved in accordance with sections 503, 504, or 523 of the Act. In the Secretary's recitation of his authority, he states as follows:

> § 710.3 Authority.
>
> (a) The Secretary is directed to implement an initial regulatory program within six months after the date of enactment of the Act in each State which regulates any aspect of surface coal

> mining under one or more State laws until a State program has been approved or until a Federal program has been implemented.
>
> (30 C.F.R. § 710.3)

These regulations implement the above listed provisions of 30 U.S.C. § 1265, within the authority granted to the Secretary under 30 U.S.C. § 1252(c).

As stated above, interim enforcement of these standards is jointly handled by the OSM and the respective states. In fact, 30 C.F.R. § 720.11 states as follows:

> § 720.11 Enforcement authority.
>
> Nothing in the Act or these regulations shall be interpreted to preclude a State from exercising its authority to enforce State law, regulations, and permit conditions, unless compliance with the State law, regulations, or permit condition will preclude compliance with these regulations.

In the instant case, Ohio's interim enforcement program had been approved by the Secretary and Ohio was enforcing the interim standards of 30 C.F.R. Parts 710 through 725.

An interesting event, however, occurred on December 31, 1979. On that date, by a notice published in the Federal Register (44 Fed. Reg. 77445) and by amendment to 30 C.F.R. § 701.1(b)(3), the Secretary declared that the regulations of 30 C.F.R. Part 761 would be applicable during the interim regulatory program. The regulations of Part 761 implement the standards and requirements of 30 U.S.C. § 1272 and are part of the permanent regulatory program authorized by 30 U.S.C. § 1251(b).

30 U.S.C. § 1272(e) provides, *inter alia*:

> Prohibition on certain Federal public and private surface coal mining operations
>
> (e) After August 3, 1977, and subject to valid existing rights no surface coal mining operations except those to which exist on August 3, 1977, shall be permitted—
>
> . . .
>
> (5) within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional building, public park, *or within one hundred feet of a cemetery.* Pub. L. 98-87, Title V, § 522, Aug. 3, 1977, 91 Stat. 507. (emphasis added.)

30 C.F.R. § 761 provides, *inter alia*:

> 761.5 Definitions.
>
> For the purposes of this part:
>
> *Cemetery* means any area of land where human bodies are interred.
>
> [44 FR 15341, Mar. 13, 1979, as amended at 44 FR 77447, Dec. 31, 1979]

By this amendment, the Secretary sought to enlarge and extend the coverage so as to embrace private family burial plots not theretofore regarded as cemeteries.

It is the application of 30 U.S.C. § 1272, as implemented by 30 C.F.R. § 761.5, to the appellants during the interim program which is challenged.

II. Facts

The facts as found by the district court were not in dispute. The answer of the defendants admitted thirty-five of the plaintiff's thirty-seven factual allegations.

Holmes Limestone is engaged in the mining of coal in Holmes County, Ohio, as well as in surrounding counties. It is a closely held corporation which employs 80 persons and derives 90 percent of its coal production from Holmes County.

There is a very high concentration of Amish people living in Holmes County. The Amish bury their dead on their own farms in small, private burial plots. These small family burial plots are usually located on the family farm or on the farm of a close relative on the top of a hill. There are hundreds of these small burial plots throughout Holmes County, Ohio. These small private burial plots can hardly be called a cemetery as members of the public are not buried there.

There are two such farms with family burial plots involved in this appeal. One is owned by Melvin H. Raber, the other by Noah M. Beachy. Holmes Limestone entered into written leases with the owners to mine coal on these farms on April 12, 1979 and May 2, 1979, respectively. These leases do not mention the burial plots, but do require that operations comply with the law of State of Ohio.

Holmes Limestone has developed quite a favorable reputation in Holmes County as a careful and conscientious coal mine operator. The company is highly trusted in the county and has been mining on Amish lands for 30 years. The company is known for its reclamation procedures and for its care and concern in all aspects of its operation. It is also undisputed

that the Amish landowners herein are strongly desirous of having Holmes Limestone mine within 25 feet of their family burial plots, as it has been repeatedly demonstrated it can be safely done without injury to the graves and they do not want to lose the coal which can be mined.

During the interim program, Ohio coal operators are required to apply to the Ohio Department for Natural Resources, Division of Reclamation for a permit. (Ohio Rev. Code § 1513.01 *et seq.*; 30 U.S.C. § 1252(a)). In September, 1979, Holmes Limestone applied to Charles Call, Chief of the Ohio Division of Reclamation, (Ohio Department of Natural Resources) for a permit to mine on the Beachy farm. The permit was granted on March 15, 1979. The permit prohibited mining within 100 feet of the burial plot in accordance with Ohio Administrative Code § 1501: 13-19-03-(3).

In December, 1979, Holmes Limestone applied to Chief Call for an amendment to the permit which would allow it to mine within 100 feet of the burial plot. On January 4, 1980, Chief Call issued an order denying the application for an amendment to the permit.

Following Ohio's administrative procedure, Holmes Limestone appealed that order to the Ohio Reclamation Board of Review. A hearing was held before the Board on March 5, 1980. On March 27, 1980, the Board ruled that the small private family burial plot on the Beachy farm was not a "cemetery" within the meaning of § 1501:13-19-03(3) of the Ohio Administrative Code. The Board ordered that Chief Call issue the amended permit to Holmes Limestone allowing it to mine within 100 feet of the plot but no closer than 25 feet. (App. 13-15).

Prior to issuing the amended permit, Chief Call received oral instructions from John McDowell, Solicitor of the Office of Mining, Reclamation and Enforcement (OSM) not to issue the permit. On April 16, 1980, Call received a letter from Edgar Imhoff, Regional Director of the OSM which threatened enforcement action against Holmes Limestone and informed Call that the issuance of the permit would be inconsistent with Ohio's responsibilities for implementation of the interim program under the Federal grant. (App. 16). All of this was apparently an interference with Ohio's authorized procedures.

On May 1, 1980, faced with these conflicting orders, Chief Call appealed the decision of the Ohio Reclamation Board of Review to the Franklin County (Ohio) Court of Common Pleas and requested a stay of the Board's order to issue the permit. Following a hearing on May 16, 1980, the Common Pleas Court denied the motion for a stay and on May 19, 1980, issued an order authorizing the amended permit, which was then issued.

On December 18, 1979, Holmes Limestone applied to the Ohio Division of Reclamation for a permit to mine on the Raber property. As with the Beachy property, the permit allowed mining up to within 100 feet of the burial site located on the property. On April 25, 1980, Holmes Limestone applied for an amended permit to allow it to mine up to within 25 feet of the plot. The process was held up in the Ohio Division of Reclamation due to the filing of the instant case in district court. The amended permit was, however, eventually issued in October, 1980. Holmes Limestone has apparently been conducting mining operations in the area between 25 and 100 feet of the burial plot since that time.

As noted above, the amended permit to mine on the Beachy farm was issued on May 19, 1980. Holmes Limestone thereafter commenced operations. On June 6, 1980, Holmes Limestone and the Ohio Mining and Reclamation Association filed suit in the United States District Court seeking to enjoin the OSM from enforcing 30 U.S.C. § 1272(e)(5) and 30 C.F.R. § 761.5 against them and for declaratory relief.

On June 11, 1980, Holmes Limestone was served with a "notice of violation" for mining within 100 feet of the burial plot on the Beachy property.

As regards the declaratory relief, appellants sought to have 30 C.F.R. § 761.5 declared arbitrary, capricious and inconsistent with the Act as written and applied; to have the statute and the regulation construed not to apply to small private family burial sites located on private property; and in the alternative, to have the statute and/or the regulation declared unconstitutional. The action also sought a preliminary injunction.

At the trial, there was not an iota of evidence offered by the Secretary that the mining near the private burial plots permitted by the State would result in any damage to the graves or to the environment. We ask then whose interest was the Secretary attempting to protect if it is clear that the conduct of the Secretary was arbitrary and capricious? He also seeks to deprive all federal courts of jurisdiction to remedy the violations except the District Court for the District of Columbia, where it would be impossible for appellants to obtain any relief.

Neither the appellants nor the Amish had any previous knowledge of the Act or the regulations and did not participate in any manner in their promulgation. The time for taking any action had long since expired. If the regulations are applied to appellants,

they have no remedy to redress under the Act the taking or violation of their property rights.

The Secretary filed an answer (App. 44) and an amended answer (App. 46) and both parties filed stipulations (App. 48). Following a hearing on June 30, 1980, the district court entered a preliminary injunction prohibiting the Secretary from taking further enforcement action against Holmes Limestone for mining within 100 feet of the burial plots.

III. Jurisdiction

The district court dismissed the appellants' challenge to the validity of 30 C.F.R. § 761.5 based on its finding that it lacked jurisdiction to consider the challenge under 30 U.S.C. § 1276(a)(1). That section provides:

> § 1276. Judicial review—Review by United States District Court; venue; filing of petition; time
>
> (a)(1) Any action of the Secretary to approve or disapprove a State program or to prepare or promulgate a Federal Program pursuant to this chapter shall be subject to judicial review by the United States District Court for the District which includes the capital of the State whose program is at issue. Any action by the Secretary promulgating national rules or regulations including standards pursuant to sections 1251, 1265, 1266, and 1273 of this title shall be subject to judicial review in the United States District Court for the District of Columbia Circuit. Any other action constituting rulemaking by the Secretary shall be subject to judicial review only by the United States District Court for the Dis-

> trict in which the surface coal mining operation is located. Any action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with the law. A petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action, or after such date if the petition is based solely on grounds arising after the sixtieth day. Any such petition may be made by any person who participated in the administrative proceedings and who is aggrieved by the action of the Secretary.

The legislative history of the Act indicates that both Senate and House versions of the bill that was considered expressly stated that such review was to be *only* in the District of Columbia, but the word *only* was later deleted in the Conference Committee bill that was finally adopted. If Congress had desired to limit jurisdiction to the District of Columbia it would never have deleted the word *only* from the bill.

It should also be noted that the Act even provides that any subject to review "shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law." The Secretary would even preclude the District Court for the District in which the surface coal mining operation is located from determining whether his action is arbitrary or capricious.

In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), the court stated:

> A survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is per-

> suasive reason to believe that such was the purpose of Congress." (Citations omitted)

This has been reinforced by the enactment of the Administrative Procedure Act which embodies the basic presumption of judicial review. Holmes Limestone doing business with the Amish in Holmes County had no knowledge of the adoption of regulations by the Secretary restricting its right to engage in a lawful business. It had property rights, equipment and leases which were in existence even prior to the enactment of the Act and its regulations. To hold that such regulations can deprive it of its property rights raises serious constitutional questions which are being invoked in this appeal. See concurring opinion of Justice Powell in *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 289-91 (1978) rev. 545 F.2d 1 (6th Cir. 1976).

Since the district court dismissed for lack of jurisdiction it made no determination of the issue whether the action of the Secretary was arbitrary and capricious. This issue would appear to us to be a mixed question of law and fact requiring resolution by the trial court.

Application of the 100 feet rule in force as to public cemeteries with respect to Holmes Limestone and the Amish under the Administrative Procedure Act, 5 U.S.C. § 706(2), would not appear to make sense since it bears no reasonable relationship to anything. Without any reason the Secretary could have named 150 feet or 50 feet. Also the private burial plots could have only one or two graves. The uncontroverted evidence at the trial is that surface mining can be safely conducted as close as 5 feet to the graves and cause no harm either to the graves or grave sites. *Cf. In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1358-80 (D.C. Cir. 1980).

There are serious questions about the propriety of limiting jurisdiction to review the regulations in issue to the District of Columbia within 60 days of its promulgation. No such regulation should be enforced by the court in this type of case without clear statutory support therefor which is lacking here. It is submitted that the Secretary has no authority to legislate by regulation.

There is no evidence that Congress ever intended to regulate private family burial plots not open to the public. It can hardly be claimed that the mining close to the graves on private property interferes with interstate commerce.

It certainly appears to be arbitrary and capricious for the Secretary to permit one coal operator to desecrate the graves in a public cemetery by removing the graves therefrom to another location to permit surface mining and at the same time interfering with another operator which respects a private family burial site by leaving it wholly intact and undisturbed and mining only to within 10 to 25 feet of it. The regulation thus permits desecration of graves and is therefore inconsistent with the Act.

Section 1501:13-19-03(3) of the Ohio Administrative Code was enacted from Section 522(e) of the Act, 30 U.S.C. 1272(e). The Ohio Reclamation Board of Review held and the Common Pleas Court of Franklin County, Ohio, preliminarily decided that for the purpose of Ohio law, the private family burial site on the Raber farm involved in this appeal is not a *cemetery* within the meaning of that section of the Ohio Administrative Code. Also Ohio's proposed Regulation 1501:13-3-02 provides as follows:

> (K) "Cemetery" means any area of land where human bodies are interred, but does not include private burial grounds.

The Secretary's arbitrary ruling occurred during the time when the interim standards were applicable and Ohio had jurisdiction and the ruling has interfered with the coal mining of Holmes Limestone and the Amish farmers and has already destroyed mining in certain areas resulting in substantial and irretrievable losses to both if the claimed arbitrary and unconscionable conduct of the Secretary is enforced by the courts.

We are of the opinion that it is not necessary for us at this time to rule on the claims to constitutional violations asserted by Holmes Limestone. We are not required to rule on the constitutional claims unless it is necessary. The district court on remand now having jurisdiction, may rule on the issue whether the Regulations and the Secretary's construction and application of them are arbitrary, capricious or otherwise inconsistent with law.

The record also reveals that Holmes Limestone and also the Amish owned other properties or leases existing prior to the Act and Regulations which may be affected by the position which the Secretary has taken and these issues can be considered and evidence relating thereto introduced on remand in the district court.

It should be noted that the *Hodel* decision of the Supreme Court referred to in the concurring opinion of Judge Merritt refers only to *facial* challenges to the constitutionality of the statutes and not to challenges of actual violations of the constitution which may be considered by the district court in remand if necessary.

The judgment of the district court is reversed and the cause is remanded for further proceedings consistent with this opinion.

MERRITT, concurring in the judgment. I agree that the district court has jurisdiction in this case to review the regulation defining the term "cemetery," 30 C.F.R. § 761.5, promulgated by the Secretary of the Interior. I disagree, however, with the reasoning employed in the majority opinion.

The jurisdictional question is solely one of legislative intent, requiring an interpretation of the statute in which Congress provided for judicial review of rules promulgated under the 1977 Surface Mining Act:

> Any action of the Secretary to approve or disapprove a State program or to prepare or promulgate a Federal program pursuant to this chapter shall be subject to judicial review by the United States District Court for the District which includes the capital of the State whose program is at issue. Any action by the Secretary promulgating national rules or regulations including standards pursuant to sections 1251, 1265, 1266, and 1273 of this title shall be subject to judicial review in the United States District Court for the District of Columbia Circuit. Any other action constituting rulemaking by the Secretary shall be subject to judicial review only by the United States District Court for the District in which the surface coal mining operation is located. Any action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law. A petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action, or after such

> date if the petition is based solely on grounds arising after the sixtieth day. Any such petition may be made by any person who participated in the administrative proceedings and who is aggrieved by the action of the Secretary.

30 U.S.C. § 1276(a)(1). The court below held that the challenged regulation is a "national" regulation and interpreted the grant of review of such regulations in the District Court for the District of Columbia to be exclusive. The court concluded that it was foreclosed by the statute from addressing Holmes Limestone's argument that the regulation is arbitrary and capricious. The government agrees with the district court's reading of the statute, and argues that the statute requires that this challenge be brought within sixty days of the promulgation of the regulation, a period that expired prior to commencement of this action. The government also argues that under the last sentence of 30 U.S.C. § 1276(a)(1), challenges to regulations may be brought only by parties who participated in the rulemaking process. Thus the government's position would not merely require parties in Holmes Limestone's position to litigate their claims in an inconvenient forum, but would altogether foreclose the availability of judicial relief. The government states that its interpretation reflects the Congressional intent that the propriety of a national regulation be determined in a single proceeding in a single forum within sixty days of its promulgation. This would guarantee that the important policies of the Act would be implemented in an efficient, orderly fashion. A contrary interpretation, the government argues, would "jeopardize the entire surface mining regulatory program" (Appellee's Brief at 15), because of the disruptive effects

of constant litigation in the various courts throughout the country and the possibility of varying and contradictory interpretations rendered by different reviewing courts.

The government's policy argument has some force. But it conflicts with another policy that is paramount, namely the policy in favor of granting parties access to federal courts to resolve controversies arising from final administrative actions. *Cf. Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967) ("judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress"); *Rusk* v. *Cort*, 369 U.S. 367, 379-80 (1962) (judicial review under the Administrative Procedure Act will not be foreclosed "in the absence of clear and convincing evidence that Congress so intended").

The government urges that the provisions in § 1276 (a)(1) for review of national rules in the District Court for the District of Columbia and within sixty days of their promulgation provide evidence of a Congressional intent to restrict review. Holmes Limestone responds that the Conference Committee's deletion of the word "only" in the sentence referring to the District of Columbia court and the absence of any other language expressly limiting review reveal a Congressional intent to the contrary. It argues that Congress meant by this statute to extend jurisdiction to the District Court for the District of Columbia but not to cut off other avenues for relief. The language of § 1276(a)(1) is unclear, and the legislative history is inconclusive on the question of whether Congress intended the prescribed methods of review to be exclusive. Two considerations lead

me to interpret the statute against such exclusivity. First, in other statutory schemes Congress has clearly limited judicial review in a fashion that demonstrates that it knows how to express such an intent when it wishes. This was the situation in the statutes involved in the cases relied upon by the lower court and the government. *Yakus* v. *United States*, 321 U.S. 414 (1944) (Emergency Price Control Act); *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275 (1978) (Clean Air Act). In comparison, the absence of any such express language in § 1276(a)(1) evidences Congressional intent that the review provisions not be exclusive.

Although positive intent cannot always be construed from Congressional silence, that interpretation works to the same end in this case as does the second consideration, which is the policy discussed above against foreclosing channels of judicial review. In the present case the government's construction of the statutory language would work a grave hardship upon small and medium-sized firms throughout the nation that lack the resources to participate in, or even remain abreast of, the manifold governmental activities that may someday affect their operations. As Justice Powell stated in *Adamo Wrecking*, *supra*, "It is totally unrealistic to assume that more than a fraction of persons and entities affected by a regulation—especially small contractors scattered across the country—would have knowledge of its promulgation or familiarity with or access to the Federal Register." 434 U.S. at 290 (Powell, J., concurring). The Supreme Court has upheld the constitutionality of express statutory restrictions upon judicial review of agency action. Nonetheless, the hardships resulting from restrictions upon review, borne by countless

parties merely because they lack funds or political acumen, persuade me that in the absence of express provisions ambiguous statutory language should not be read to foreclose judicial relief.

I agree, therefore, with the majority's conclusion that the district court has jurisdiction to review Holmes Limestone's challenge of the regulation defining the term "cemetery." I express no opinion at this time on the merits of the claim, and I believe the majority improperly indulges in a discussion of the merits—even though it confesses that the issue is to be properly entertained only by the district court upon remand—that is unnecessary for a resolution of the case before us and that, therefore, can be read as nothing more than a strongly-worded personal opinion.

On the other hand, the majority fails to address the constitutional claims raised by Holmes Limestone, which are before us upon appeal and should be considered for a proper resolution of this case. Holmes Limestone argues that even if the regulation is not arbitrary and capricious, its application under 30 U.S.C. § 1272(e)(5) to forbid mining within one hundred feet of a private burial plot works an uncompensated taking of property and a denial of equal protection and is in excess of the federal government's authority under the commerce clause. The court below rejected these claims. I agree with the district court that the regulation as applied does not result in a taking in violation of the fifth amendment. I also think there is no merit to the equal protection claim. There is some question whether the commerce clause question was properly raised below. Even if it was, however, Holmes Limestone's position appears to have been rejected in two recent Supreme Court

opinions that upheld various sections of the Act against similar challenges. *Hodel* v. *Virginia Surface Mining and Reclamation Ass'n*, 49 U.S.L.W. 4654 (June 15, 1981); *Hodel* v. *Indiana*, 49 U.S.L.W. 4667 (June 15, 1981).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 80-3666

HOLMES LIMESTONE CO., ET AL.,
PLAINTIFFS-APPELLANTS

vs.

CECIL B. ANDRUS, ET AL., DEFENDANTS-APPELLEES

[Filed Aug. 6, 1981]

Before: WEICK and MERRITT, Circuit Judges and ENSLEN, District Judge.

JUDGMENT

Appeal from the United States District Court for the Northern District of Ohio

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case is remanded for further proceedings consistent with the opinion of this Court.

No costs taxed. Each party to bear own costs on this appeal.

ENTERED BY ORDER
OF THE COURT

JOHN P. HEHMAN
Clerk

/s/ [Illegible]
Chief Deputy Clerk

A True Copy.

Attest:

/s/ Gary McCarthy
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 80-3666

HOLMES LIMESTONE CO., ET AL.,
PLAINTIFFS-APPELLANTS

v.

SECRETARY OF THE INTERIOR, ET AL.,
DEFENDANTS-APPELLEES

[Filed Sept. 29, 1981]

Before WEICK and MERRITT, Circuit Judges and ENSLEN, U.S. District Judge.*

ORDER

Upon consideration, it is ORDERED that the petition for rehearing filed by the Secretary of the Interior be and it is hereby denied.

ENTERED BY ORDER
OF THE COURT

/s/ [Illegible]
Clerk

---

* The Honorable Richard A. Enslen, United States District Judge, Western District of Michigan, sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. C80-933A

HOLMES LIMESTONE CO., ET AL., PLAINTIFFS

v.

CECIL B. ANDRUS, ET AL., DEFENDANTS

[Oct. 7, 1980]

MEMORANDUM OPINION AND ORDER

ALDRICH, J.

Plaintiff Holmes Limestone Company ("Holmes") seeks a declaratory judgment and a permanent injunction against defendant Secretary of the United States Department of the Interior ("Secretary") to prevent the enforcement against Holmes, with respect to two pieces of property in Holmes County, Ohio, of § 522(e)(5) of the Surface Mining Act of 1977, 30 U.S.C. § 1272(e)(5). Section 522(e)(5) provides, in pertinent part:

> After August 3, 1977, and subject to valid existing rights, no surface coal mining operations except those which exist on August 3, 1977, shall be permitted—
>
> * * *
>
> (5) within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery.

The Secretary has defined a "cemetery" as "any area of land where human bodies are interred". 30 C.F.R. 761.5.

The case was consolidated and advanced pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, and heard together with Holmes' motion for a preliminary injunction. A preliminary injunction was issued on June 30, 1980, pending this final determination.

This Court now finds that it lacks jurisdiction to review the definition of the word "cemetery" as defined by the Secretary; that § 1272(e)(5) and 30 C.F.R. 761.5 do not constitute a taking of the plaintiff's property in contravention of the Fifth Amendment; and that plaintiff lacks standing to assert any Tenth Amendment right the State of Ohio may have with respect to the regulation of its land by § 1272 (e)(5).

The Court therefore orders that the preliminary injunction be dissolved and that judgment be entered for the defendant in accordance with the following Memorandum.

Facts

The facts in this case are not in dispute.

In 1977, Congress enacted the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201, *et seq.*, with an express two-fold purpose—(1) the optimal retrieval of a valuable source of energy, consistent with (2) the protection of society and the environment. The Act established a two-tier regulatory program. The first tier is an interim program; the second tier is a permanent program. The interim program remains in effect until a state receives an approved program, or failing federal approval, until

the federal government implements a federal program for that state. Sections 503, 504, 30 U.S.C. §§ 1253, 1254. During the interim program, the Secretary and the states share joint responsibility for enforcement of the regulatory program. Ohio's program is currently undergoing review by the Department of Interior's Office of Surface Mining Reclamation and Enforcement (OSM). Hence, Ohio is operating under the interim program, issuing permits under its existing laws, pursuant to Section 502(a) of the Act, 30 U.S.C. 1252(a).

Ohio Administrative Code, § 1501:13-19-03(c) is identical to Section 522(e)(5) of the Surface Mining Act. However, Ohio has no statutory definition of the word "cemetery".

Plaintiff Holmes Limestone employs about eighty people has been engaged in strip mining in Holmes County, Ohio, and surrounding counties, for more than thirty years. Holmes County is characterized by a terrain of rolling hills, farmed in large part by the Amish. The Amish live simply, eschewing most modern conveniences, and are particularly careful stewards of their lands.

Holmes has in the past strip mined on a number of Amish farms, and has earned an impeccable reputation for the care which it has taken in mining within a few feet of barns, orchards, duck ponds, and cemeteries.

Holmes now holds two leases—one to strip mine the coal on Noah Beachy's farm, and the other to strip mine the coal on Melvin Raber's farm. Both Beachy and Raber are Amish farmers who owned their land in fee prior to the passing of the Surface Mining Act. Both leases to Holmes were executed after the passage of the Surface Mining Act. In September of 1979,

the Ohio Department of Natural Resources granted Holmes a permit to strip mine coal on Noah Beachy's property on the condition that it not strip mine closer than one hundred feet from the private family burial site. The burial site is a fenced enclosure atop a rolling hill, not open or accessible to the general public, which includes the graves of some thirty of Noah Beachy's ancestors and relatives. Holmes began strip mining on both farms, although it has not, as yet, reached the terrain near the burial site on the Raber property.

In December of 1979, Holmes applied to the Ohio Department of Natural Resources for an amendment to its permit, to allow it to strip mine coal in the area between twenty-five feet and one hundred feet from the Beachy family burial site.

On January 4, 1980, the Ohio Department of Natural Resources denied the application on the ground that the mining would occur within one hundred feet of a "cemetery", prohibited by Ohio Strip Mining Regulation 1501:13-19-03(c), which is identical to 30 U.S.C. § 1272(e)(5). Holmes appealed to the Ohio Reclamation Board of Review which held a hearing, and, on March 27, 1980, the Board reversed the Ohio Department of Natural Resources on the ground that the private family burial site on the Beachy farm was not a "cemetery" within the meaning of Ohio Strip Mining Regulation 1501:13-19-03(c). The Department of Natural Resources was directed to issue the amended permit. Before this action could be taken, the Chief of that Division was advised by employees of the defendant Secretary of the United States Department of Interior not to issue the permit, threatening a cut-off to Ohio of federal funds if the permit were issued, as well as action against plaintiff Holmes

Limestone Company if mining activities were conducted within one hundred feet of the Beachy burial site.

On May 19, 1980, the Chief of the Division's appeal requesting a stay of the Board's decision was denied, and he was ordered by the Court of Common Pleas of Franklin County to issue the permit. Plaintiff Holmes began strip mining coal in the area between twenty-five and one hundred feet from the Beachy burial site. On June 6, 1980, plaintiff filed its complaint in this case, seeking a declaratory judgment and a permanent injunction against the defendant Secretary of the United States Department of the Interior. On June 11, 1980, Holmes was cited by the Interior Department's Office of Surface Mining for violation of Section 522(e)(5) of the Surface Mining Act, 30 U.S.C. § 1272(e)(5). Holmes then ceased all mining operations in the disputed area.

Undisputed testimony established that the area in question includes about .9 acres, and should produce approximately 6,000 to 8,000 tons of coal, for which Mr. Beachy would receive approximately $12,000 in royalties. It was further established that if the coal were not mined in concert with the strip mining currently in progress, it would be economically and physically infeasible to come back and retrieve it. The coal would be forever lost. Photographs demonstrated the quality of Holmes care in reclamation on other similar property—reclamation that proceeds as the mining operation progresses from one cut to the next. The evidence also demonstrated that after reclamation it is impossible to tell where the strip mining, closer than one hundred feet from a family burial site, took place. Testimony of a number of Holmes' officers and employees was persuasive in support of

Holmes' reputation for care and concern about all aspects of its operation.

Mr. Beachy's affidavit, which strongly asserted his desire that Holmes be allowed to continue the operation around the burial site, was given considerable weight by the Court, in view of defendant's counsel's representation that he had met with Mr. Beachy, that the affidavit faithfully represented Mr. Beachy's point of view, and that defendant's counsel felt no need to take a deposition or otherwise cross examine the Amish farmer whose religious beliefs prohibited him from appearing in open court.

Jurisdiction

The Secretary argues that this Court lacks jurisdiction for two reasons: first, that Holmes has failed to exhaust its administrative remedies; and second, that pursuant to § 526(a)(1), 30 U.S.C. § 1276(a)(1) of the Act, Holmes' challenge to the validity of the Secretary's regulation defining the word "cemetery" could have been brought only in the District Court for the District of Columbia, and then only within sixty days from the date of the promulgation of the regulation.

Holmes properly filed its complaint in this Court on June 6, 1980. Five days later, the Office of Surface Mining issued a notice of violation against Holmes for mining within one hundred feet of a cemetery on the Noah Beachy property. It is the Secretary's argument that once the notice of violation was issued, Holmes, through § 525, 30 U.S.C. § 1275 of the Act, came under the jurisdiction of the Department of the Interior. Section 525 provides, generally, for administrative review by the Secretary of orders and notices issued to permittees.

It is clear, however, that at the time Holmes filed its complaint, there had been no agency action requiring Holmes to seek relief through administrative channels; hence, there were no administrative remedies to exhaust. The subsequent notice of violation could not serve to divest this Court of its jurisdiction.

However, this Court does lack jurisdiction to review Holmes' challenge to the validity of the regulations promulgated by the Secretary. This Court must conclude that the only proper forum for such review is the District Court for the District of Columbia. Section 526(a)(1), 30 U.S.C. § 1276(a)(1) 30 U.S.C. § 1276(a)(1), states in part:

> . . . Any action by the Secretary promulgating national rules or regulations . . . shall be subject to judicial review in the District of Columbia Circuit. [sic] Any other action constituting rulemaking by the Secretary shall be subject to judicial review only by the United States District Court for the District in which the surface coal mining operation is located. Any action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious or otherwise inconsistent with law. A petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action or after such date if the petition is based solely on grounds arising after the sixtieth day . . . .

There can be no doubt but that the definition of a "cemetery" is a national rule, intended for national application. As such, its validity is subject to review only in the District Court for the District of Colum-

bia. It matters not that this Court might doubt the wisdom of the regulation, or the breadth of the definition [1]; nor does it matter that this Court might question the adequacy of the administrative process that led to its promulgation. This Court simply lacks jurisdiction to consider those questions. *In Re Surface Mining Regulation Litigation*, 456 F.Supp. 1301, 1307 (D.D.C. 1978).

Statutory schemes for judicial review similar to those found in § 526(a)(1), 30 U.S.C. § 1276(a)(1) of the Surface Mining Act are not uncommon. See, *e.g.*, 42 U.S.C. § 7607(b)(1) (Clean Air Act). The Congressional intent is to provide for judicial review of administrative regulations of national application in one specific court, and within a relatively short period of time (30 to 60 days) after their promulgation. Thereafter, the validity of the application of the regulation may be left to the geographically appropriate United States District Courts. So long as the opportunity for testing the validity of the regulation has been provided, persons against whom the regulation is later applied may be precluded from raising the validity of the regulation as a defense, without violation of due process. Courts have consistently reached this conclusion in both criminal administrative enforcement cases, *Yakus* v. *United States*, 321 U.S. 414, 443-44 (1944); *United States* v. *Adamo Wrecking Co.*, 545 F.2d 1,5-6 (6th Cir. 1976),

---

[1] See *Marietta Coal Co.* v. *Office of Surface Mining Reclamation and Enforcement*, Docket No. IN-12-R (May 21, 1981), appeal pending to Interior Board of Surface Mining and Reclamation Appeals, IBSMA No. 80-42 (private burial plot abandoned since the 19th century not considered a "cemetery" within the meaning of § 522(e)(5), 30 U.S.C. § 1272(e)(5) of the Act).

rev'd on other grounds, 434 U.S. 273 (1978); and in civil administrative enforcement cases, *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d 349 (3rd Cir. 1972), cert. denied, 409 U.S. 1125 (1973); *Union Electric Co.* v. *EPA*, 515 F.2d 206, 220 (8th Cir. 1975), aff'd, 427 U.S. 246 (1976).

A fortiori must this principle apply in a case such as this one, where Holmes seeks a declaratory judgment against an anticipated civil administrative enforcement action. It must be concluded that §526(a)(1) requires Holmes' challenge to the validity of the Secretary's regulation, i.e., the definition of "cemetery" to have been brought in the District Court for the District of Columbia, and that this requirement does not violate constitutional due process.

Fifth and Tenth Amendment Issues

While this Court has no jurisdiction to review the validity of the national regulation, it plainly has jurisdiction to review constitutional challenges to the application of the Act, and the regulations promulgated thereunder. Section 526(a)(1), 30 U.S.C. § 1276(a)(1).

Holmes challenges the constitutionality of the application of the Act to itself, arguing, in reliance upon *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), that enforcement of §522(e)(5) constitutes a taking of its property without just compensation, in violation of the Fifth Amendment.

Since Holmes acquired its interest in the property in question two years after the enactment of the Surface Mining Act, with full knowledge of the statutory prohibitions, it cannot now assert that the Act constitutes a taking of its property. Even assuming that Holmes could raise the constitutional claims of a

third party (on a *Jackson* v. *Barrows*, 346 U.S. 249 (1953) theory), it is clear that no taking is involved.

As pointed out in *Penn Central Transportation Co.* v. *City of New York*, —— U.S. ——, 98 S.Ct. 2646 (1978):

> . . . In deciding whether a particular governmental action has effected a taking, the Court focuses rather both on the nature and extent of the interference with rights in a parcel as a whole. . . . *Id.* at 2663.

In the instant case, the Surface Mining Act merely regulates the use of the land. Limiting the proximity of surface mining operations to a cemetery protects the cemetery from the hazardous effects of surface mining and is plainly within the purpose and intent of the Act. The land in question can still be used for all the purposes for which it was used prior to the passage of the Act; the only excluded use is the surface mining of coal. Such a limitation on land use does not rise to a "taking" of constitutional magnitude, and the remaining uses distinguish this case from *Pennsylvania Coal Co. supra*, where the statute in question served to deprive the owner of the *total* use of its property interest.

Finally, Holmes challenges the constitutionality of the Act as violating the rights of the State of Ohio under the Tenth Amendment. Ohio has not challenged the Act in this Court, and it is quite clear that Holmes has no standing to assert the rights of the State of Ohio under the Tenth Amendment. *Tennessee Electrical Power Co.* v. *TVA*, 306 U.S. 118 (1939).

It is indeed regrettable that, in this case, the law falls so harshly on Holmes, a company which, without doubt, successfully strip mines with meticulous at-

tention to environmental concerns. However, this Court must, reluctantly, dissolve its preliminary injunction and enter judgment for the defendant.

IT IS SO ORDERED.

/s/ Ann Aldrich
United States District Judge

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 388801 797

Opposition

Supreme Court, U.S.
FILED
APR 23 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1585

In the Supreme Court of the United States

October Term, 1981

JAMES G. WATT, Secretary of the Interior, *et al.*,
Petitioners,

VS.

HOLMES LIMESTONE CO., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CRITCHFIELD, CRITCHFIELD, CRITCHFIELD
& JOHNSTON
J. C. JOHNSTON III
J. DOUGLAS DRUSHAL
Counsel of Record
225 North Market Street
P. O. Box 488
Wooster, Ohio 44691
(216) 264-4444
Counsel for Holmes Limestone Co.

CHESTER, HOFFMAN & WILLCOX
ROBERT D. ZITKO
Counsel of Record
8 East Broad Street
Columbus, Ohio 43215
(614) 221-4000
Counsel for Ohio Mining and Reclamation Association

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

STATEMENT 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The decision of the Court of Appeals is not in conflict with a decision of any other Court of Appeals 5

II. The decision of the Court of Appeals does not represent a departure from the accepted and usual course of judicial proceedings 6

III. Petitioners incorrectly argue that the decision of the Court of Appeals frustrates congressional intent 9

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 3-4, 7

Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978) 8

Caminetti v. United States, 242 U.S. 470 (1917) 10

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 7

Deering Milliken, Inc. v. OSHRC, 630 F.2d 1094 (5th Cir. 1980) 7, 13

Gardner v. Alabama Department of Pensions & Security, 385 F.2d 804 (5th Cir. 1967), *cert. den.*, 389 U.S. 1046 (1968) 11

Getty Oil Co. v. Ruckleshaus, 467 F.2d 349 (3d Cir. 1972), *cert. den.*, 409 U.S. 1125 (1973) 11, 12
Hodel v. Indiana, 452 U.S. 314 (1981) 2
Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) 2
Pierson v. United States, 428 F. Supp. 384 (D. Del. 1977) 7
Reading Anthracite v. Office of Surface Mining, No. 80-0667 (E.D. Pa. Oct. 8, 1980) 5
Rusk v. Cort, 369 U.S. 367 (1962) 4, 7
Standerfer v. United States, 447 U.S. 10 (1980) 10
Union Carbide Corp. v. Andrus, 13 E.R.C. 1481 (S.D. W.Va. 1979) 5
United States v. Shreveport Grain & Elevator Co., 287 U.S. 77 (1932) 10
Wadley Southern R. Co. v. Georgia, 235 U.S. 651 (1915) 14
Yakus v. United States, 321 U.S. 414 (1944) 10, 11, 14

Constitutional Provisions, Statutes and Rules

U.S. Const., Art. I, § 8 11
5 U.S.C. Sections 701, *et seq.* 2, 9
28 U.S.C. Section 1331 ..... 2, 9
28 U.S.C. Section 1346 2
28 U.S.C. Sections 2201 and 2202 ..... 2, 9
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Sections 1201, *et seq.*:
Section 503, 30 U.S.C. Section 1253 13
Sections 515 and 516, 30 U.S.C. Sections 1265 and 1266 13
Section 522(e)(5), 30 U.S.C. Section 1272(e)(5) 2
Section 526(a)(1), 30 U.S.C. Section 1276(a)(1) 2, 3, 4, 9, 12, 14

42 U.S.C. Section 1973c 14
42 U.S.C. Section 7607(b)(1) 14
Section 204(d) of the Emergency Price Control Act of January 30, 1942 11
30 C.F.R. 761.5 2
Rules of the Supreme Court, Rule 17.1 ..... 3, 5, 6

Other

Section 426(a)(1), S. 7, Reported in S. Rep. 95-128, 95th Cong., 1st Sess., at 41 9
Section 526(a)(1), H. R. 2, Reported in H. R. Rep. 95-218, 95th Cong., 1st Sess., at 46 9
H. R. Rep. 95-493 (Conference Committee Report), 95th Cong., 1st Sess., at 75 9

No. 81-1585

In the Supreme Court of the United States

October Term, 1981

JAMES G. WATT, Secretary of the Interior, *et al.*,
Petitioners,

vs.

HOLMES LIMESTONE CO., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT

Respondents are satisfied with the questions presented, list of all parties to the proceeding, citations to the opinions and judgments delivered below, jurisdictional grounds, and statutes involved, as set forth in the Petition for Certiorari and they will not be repeated herein.

Respondent, Holmes Limestone Co., has no parent, subsidiary, or affiliate corporations, except for one wholly owned subsidiary. Respondent, Ohio Mining and Reclamation Association, has no parent, subsidiary or affiliate corporations.

STATEMENT OF THE CASE

The statement of the case contained in the Petition for Certiorari contains no marked inaccuracies but is incomplete and will be supplemented herein.

The jurisdiction of the district court was invoked not only under Section 526(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Section 1276 (a)(1), which is set forth in the petition. Other jurisdictional bases for this action included the general federal question statute, 28 U.S.C. Section 1331, the declaratory judgment statute, 28 U.S.C. Sections 2201 and 2202, and the Administrative Procedure Act, 5 U.S.C. Sections 701, *et seq.* *See also* 28 U.S.C. Section 1346.

The substance of the complaint was not limited to a facial challenge to the regulation in question, 30 C.F.R. 761.5. While that was an important aspect of the complaint, additional and alternative prayers for relief included finding the regulation arbitrary, capricious and inconsistent with the Act as applied to Respondents, that the regulation be construed to avoid a substantial constitutional question, that the underlying statute, Section 522 (e)(5), 30 U.S.C. Section 1272(e)(5), be construed to be inapplicable to private family burial plots, and that if the regulation and statute were found applicable, that they be declared unconstitutional *as applied* to Respondents.[1]

The district court decided that it did not have jurisdiction to review the regulation based upon its construction of Section 526(a)(1) (App. D, 31a-34a). The district court

---

1. *Cf. Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, and 297 n.40 (1981), and *Hodel v. Indiana*, 452 U.S. 314, and 335 n.20 (1981), holding the Act is facially constitutional but reserving consideration of specific applications of the Act.

ruled against Respondents on the constitutional issues (App. D, 34a-36a). The court of appeals reversed based upon its construction of Section 526(a)(1) and did not reach the constitutional questions (App. A, 12a-16a).

SUMMARY OF ARGUMENT

This case does not fall within any of the considerations for review on certiorari as set forth in Rule 17.1 of the Rules of the Supreme Court. The decision of the court of appeals is not in conflict with the decision of any other federal court of appeals on the same matter. Indeed, this is the first court of appeals to address the question and there are no other court of appeals decisions on point. The only contrary cases cited by Petitioners are two unreported district court decisions. The Petitioners have suggested a potential conflict in the circuits. That is an extremely speculative proposition based upon allegations which are not part of the record in this case. It is based upon two assumptions, that there will be substantial litigation on this question in the future *and* that other courts of appeals will reach decisions contrary to the court of appeals decision in this case, neither of which assumption may come to pass. This Court should not expend its scarce resources on the very first case to address a question which may never arise again. If the matter does arise again, this Court will have ample opportunity for review in the future after the benefit of further analysis by lower courts.

The decision of the court of appeals in the instant case does not represent a departure from the accepted and usual course of judicial proceedings, which is another consideration for certiorari under Rule 17.1. Instead, the decision below represents a conventional decision following closely this Court's decision in *Abbott Laboratories v.*

Gardner, 387 U.S. 136, 140 (1967), in which this Court held "that judicial review of a final agency action . . . will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *See also Rusk v. Cort*, 369 U.S. 367, 380 (1962), which held that judicial review of agency action will not be foreclosed "in the absence of clear and convincing evidence that Congress so intended." The decision below also recognized the gross unfairness of the attempted limitation of judicial review advanced by Petitioners along with the serious constitutional question which would be presented by such an interpretation.

The Petitioners incorrectly argue that the decision of the court of appeals frustrates Congressional intent. Both the House and Senate versions of the predecessor to Section 526(a)(1) provided that judicial review was available "*only* in the United States Court of Appeals for the District of Columbia." (Emphasis added.) The version reported by the Conference Committee and enacted by Congress deleted the word "only" and made other changes. If Congress had intended review to be limited only to the District of Columbia it would not have deleted language so providing. Cases cited by Petitioners for the proposition that statutes designating a forum for judicial review impliedly make an exclusive designation are clearly distinguishable from the case at hand as well as inconsistent with the decisions of this Court in *Abbott Laboratories* and *Rusk*. A common sense interpretation of the statute in question is that it permits but does not require a pre-enforcement review of regulations in an abstract setting but also permits adjudication of particular cases in other courts.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH A DECISION OF ANY OTHER COURT OF APPEALS

Rule 17.1 of the Rules of this Court sets forth general, although not exclusive, considerations governing review on certiorari. The principal consideration set forth therein is whether the decision in question has created a conflict with the decision of another federal court of appeals. This consideration is not met in the instant case. Indeed, there are no other federal court of appeals decisions on the point. The petition for certiorari cites only two decisions concerning the matter set forth in the questions presented.[2]

Apparently realizing this shortcoming, the Petitioners argue that the Secretary of the Interior "is currently engaged in a significant revision of the regulations and anticipate substantial litigation when the revised regulations are promulgated." (Petition, 9). This clearly goes outside the record of the instant case and the speculative nature of this prediction is apparent on its face.

The petition goes on to recite that the decision below will allow potentially conflicting interpretations of this law "inevitably calling for resolution of differing views by this Court." (Petition, 9). Such an eventuality is hardly inevitable. The future litigation itself is hardly a foregone conclusion and the suggestion that this litigation will result in conflicting interpretations is speculation and guesswork.

This Court rarely grants a petition for certiorari to the court of appeals which is the first to address a given ques-

---

2. *Reading Anthracite v. Office of Surface Mining*, No. 80-0667 (E.D. Pa. Oct. 8, 1980); *Union Carbide Corp. v. Andrus*, 13 E.R.C. 1481, 1489 (S.D. W.Va. 1979)

tion. This Court has properly adhered to the view, contemplated in Rule 17.1, that only matters receiving more frequent consideration in the lower courts are worthy of this Court's review. This Court should not expend its scarce judicial resources to decide an issue which could possibly never arise again. If the matter does arise again, as Petitioners suggest, then there will be ample opportunity to address the question in the future, with the benefit of additional lower court analyses.

It is also important to note that the facts found in the instant case are extremely narrow and unlikely to recur. This case arose out of a rural county in Ohio and concerned coal surface mining on the farms of the Amish which contain private family burial plots. It is difficult to conceive of a narrower factual situation and equally hard to think of this peculiar factual situation arising again. This case simply is not of great public interest and does not present an appropriate case for this Court's consideration of the underlying jurisdictional question.

II. THE DECISION OF THE COURT OF APPEALS DOES NOT REPRESENT A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

The only other conceivable consideration found in Rule 17.1 which could be applicable to the instant case is whether the decision of the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." This is clearly inapposite here. The decision below represents a well-reasoned adherence to previous decisions of this Court.

The general question presented in this case can be stated as follows: Should a Congressional enactment

which, at best, is ambiguous concerning limitation of federal court review of administrative action be construed narrowly in order to limit such review? This Court has forcefully answered this question several times and adopted a rule of statutory construction requiring a showing of "clear and convincing evidence" of a contrary legislative intent to support restricting access to judicial review. *Rusk v. Cort*, 369 U.S. 367, 380 (1962).

This Court held in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967):

> ". . . a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. [Citations omitted.] Early cases in which this type of judicial review was entertained, . . . have been reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review. . . . The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation . . ."

These decisions have been followed by this Court and by numerous lower courts. *E.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Deering Milliken, Inc. v. OSHRC*, 630 F.2d 1094, 1099 (5th Cir. 1980); *Pierson v. United States*, 428 F. Supp. 384, 389 n.11 (D. Del. 1977).

The decision of the court of appeals in the instant case represents no more than an application of this well estab-

lished rule of construction to a relatively new statute. This cannot be characterized as a departure from the accepted and usual course of judicial proceedings.

The unfairness and possible constitutional infirmity of the position urged by Petitioners was well presented by Justice Powell in his concurring opinion in *Adamo Wrecking Co. v. United States,* 434 U.S. 275, 289-91 (1978). Justice Powell expressed "no considered judgment" on the constitutionality of the statute in question, since the issue had not been raised by the Petitioner, but seriously questioned it and added:

> "It is also totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation—especially small contractors scattered across the country—would have knowledge of its promulgation or familiarity with or access to the Federal Register."

Id. at 290.

Similarly, Respondent, Holmes Limestone Co., is a small company mining almost exclusively in rural Holmes County, Ohio, and largely on farms of the Amish. It would be absurd to require it to challenge the peculiar application of a narrow regulation to an even narrower fact pattern within 60 days after promulgation of the regulation in the District Court for the District of Columbia. A logical conclusion of Petitioner's position herein is that such regulations cannot be reviewed and presumptively arbitrary and capricious regulations will be permitted to go unchallenged.

This Court should let stand the decision below which properly reflects the presumption this Court has established in favor of access to judicial review of agency action. This is consistent with the Administrative Procedure Act, 5

U.S.C. Sections 701 *et seq.*, the general federal question jurisdiction statute, 28 U.S.C. Section 1331, and the declaratory judgment statute, 28 U.S.C. Sections 2201 and 2202.

III. PETITIONERS INCORRECTLY ARGUE THAT THE DECISION OF THE COURT OF APPEALS FRUSTRATES CONGRESSIONAL INTENT

Section 426(a)(1) of S. 7 of the 95th Congress was the direct predecessor of Section 526(a)(1). This section read, in part, as follows:

> "Any action by the Secretary promulgating standards . . . shall be subject to judicial review *only* in the United States Court of Appeals for the District of Columbia."

Section 426(a)(1), S. 7, reported in S. Rep. 95-128, 95th Cong., 1st Sess., at 41 (emphasis added).

Section 526(a)(1) of H. R. 2 of the 95th Congress was a direct predecessor of Section 526(a)(1). This section read, in part, as follows:

> ". . . any action by Secretary promulgating standards . . . shall be subject to judicial review *only* in the United States Court of Appeals for the District of Columbia."

Section 526(a)(1), H. R. 2, reported in H. R. Rep. 95-218, 95th Cong., 1st Sess., at 46 (emphasis added).

These two provisions were significantly changed by the Conference Committee. Most importantly, for purposes of this case, the word "only" was deleted and the present text of Section 526(a)(1) was adopted. *See* H. R. Rep. 95-493 (Conference Committee Report), 95th Cong., 1st Sess., at 75. The only possible Congressional intent

which can be divined from this is that Congress intended that such action *can* be reviewed in the District of Columbia but *also* in other courts. The purpose of the statute thus becomes to vest the District of Columbia court with jurisdiction over a case with which it might otherwise have an insufficient nexus to support jurisdiction or venue.

Nowhere in the legislative history of the Act is there any expression of Congressional intent to restrict judicial review of regulations to the District Court for the District of Columbia. The legislative history cited by Petitioners in support of the proposition that Congress desired "to establish uniform national performance standards for the surface mining industry" (Petition, 9-10), refers to a desire for a national surface mining law and has nothing to do with judicial review of regulations[3].

The Petitioners' reliance on *Yakus v. United States*, 321 U.S. 414 (1944), is wholly misplaced. The statute under review in *Yakus* provided that a specific court "shall

---

3. The Petitioners suggest that committee changes made without explanation are not a reliable guide to statutory interpretation. In this case there is no doubt regarding Congressional intent. The plain meaning of a statute cannot be nullified by an omission in its legislative history. *Standerfer v. United States*, 447 U.S. 10, 20 n.12 (1980). *See also United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 83 (1932): "[R]eports [of legislative committees] are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms . . . [nor] to create an ambiguity." *See also Caminetti v. United States*, 242 U.S. 470, 490 (1917): "Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation. . . . But . . . when words are free from doubt, they must be taken as the final expression of the legislative intent and are not to be added to or subtracted from by considerations drawn . . . from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent."

have *exclusive jurisdiction* to determine the validity of any regulation or order . . ." Section 204(d) of the Emergency Price Control Act of January 30, 1942, quoted at 321 U.S. at 429 (emphasis added). Faced with such a clear statute, this Court reasonably construed it to preclude review in other courts. That statute was also enacted on an emergency basis and was supported, at least in part, by the war powers granted to Congress under Article I, Section 8 of the Constitution. The difference between the statute construed in *Yakus* and Section 526(a)(1) is like the difference between night and day.

The Petitioners have also cited *Gardner v. Alabama Department of Pensions & Security*, 385 F.2d 804, 810 (5th Cir. 1967), *cert. den.*, 389 U.S. 1046 (1968), and *Getty Oil Co. v. Ruckleshaus*, 467 F.2d 349, 356 (3d Cir. 1972), *cert. den.*, 409 U.S. 1125 (1973), as support for the proposition that Congress need not use the word "exclusive" in a statute for providing an exclusive forum for judicial review (Petition, 11). These cases do not support the Petitioners' position in this case.

In *Gardner*, the court was concerned with the review of a Social Security regulation which had been contested by an aggrieved party by both filing a complaint in the relevant district court and filing a petition for review of the regulation in the relevant court of appeals. The Fifth Circuit held that the district court did not have jurisdiction to review the regulation because exclusive jurisdiction had been placed in the respective courts of appeals. This is an unsurprising holding and is consistent with other statutory schemes which place review of agency action directly in the courts of appeals, such as review of orders of the National Labor Relations Board. This has nothing to do with the issue at hand and in no way presents the

unfairness of Petitioners' position here, which seeks to limit review to only one specific court in the entire nation and not to a particular type of court which is located throughout the country.

The decision in *Getty Oil* is similarly distinguishable insofar as it held that in the statute under review Congress had manifested a clear intent to limit judicial review to a particular forum.[4] There is no such clear intent in the instant case.

The Petitioners also argue that Section 526(a)(1) carefully sets forth a scheme of centralized judicial review under three different circumstances, and that the decision of the court of appeals "turned this careful legislative effort on its head by reading it to give centralized review in a single district court only to the Secretary's *least* significant regulatory actions, and to subject those with a national scope to the risk of conflicting interpretations in a variety of jurisdictions." (Petition, 10). This is simply incorrect.

The statute mentions review in three circumstances. The third sentence provides that any action other than promulgating national rules or regulations "shall be subject to judicial review only by the United States District Court for the District in which the surface coal mining operation is located." The same rulemaking activity of the Secretary could affect surface mining operations in a number of judicial districts and, since review would be appropriate in each district in which the surface mining operation is located, such action of the Secretary is subject to conflicting, decentralized review. Even

---

4. The statute construed provided that a review petition "may be filed *only* in the United States Court of Appeals . . ." 467 F.2d at 353 n.4 (emphasis added).

review of the Secretary's approval or disapproval of a state program, for which the first sentence provides judicial review in the district court including the capital of the state whose program is at issue, could lead to conflicting decisions insofar as the same standard applied by the Secretary in approving or disapproving a state program could be treated differently by different district courts.[5] Finally, the second sentence of the statute, at issue here, is more plausibly construed to permit but not require pre-enforcement review of a particular regulation in the District Court for the District of Columbia but to also allow review elsewhere of specific application of such regulations to a peculiar factual situation.[6] Thus, the statute itself on its face refutes the Petitioners' contention.

The text of the statute is also instructive insofar as the third sentence says that the rulemaking there at issue "shall be subject to judicial review *only* by the United States District Court for the District in which the surface coal mining operation is located." (Emphasis added). While Petitioners try to make light of the contradistinction of inserting the word "only" in this sentence of the statute while omitting the word "only" in the second sentence of the statute (indeed, it was deleted), it cannot be gainsaid that Congress knows how to be specific in limiting judicial review and if it had wished to do so in the second sentence of the statute, it would have.

---

5. *See* Sections 515 and 516, 30 U.S.C. Sections 1265 and 1266, which specify performance standards for state and federal programs under the Act and Section 503, 30 U.S.C. Section 1253, which requires a state program to have the capability of carrying out the provisions of the Act and meeting its purposes.

6. A pre-enforcement judicial review provision, as distinct from review in the context of a specific case, would not be unique to this statute. *See, e.g., Deering Milliken, supra,* 630 F.2d at 1099.

Petitioners' concern for centralized judicial review is grossly exaggerated.[7] Almost every statute Congress enacts is subject to conflicting interpretations by courts throughout the nation. To the extent this presents a problem, it is one our judicial system is capable of resolving without the drastic step of effectively precluding judicial review.[8]

---

7. With regard to the 60 day limitation on judicial review contained in Section 526(a)(1), the court of appeals did not belabor that issue as Respondents were clearly within the 60 day limitation. App. A, 15a; App. D, 29a-30a. The appeal to the Common Pleas Court of Franklin County on May 19, 1980 resulted from a letter from the Office of Surface Mining and threatening enforcement action against Respondent. This was the Respondent's first indication that the Office of Surface Mining would not deem the outcome of the Ohio courts determinative of this issue. The letter from the Office of Surface Mining was dated April 16, 1980, although actual notice of this was not received by Respondent until after that date.

8. Petitioner refers to the fact that centralized review is common, citing the Clean Air Act and Voting Rights Act. (Petition, 13 n.15). It should be noted that in stark contrast to the language of Section 526(a)(1), the Clear Air Act, 42 U.S.C. Section 7607(b)(1), provides that "[a] petition for review . . . may be filed *only* in the United States Court of Appeals for the District of Columbia." (Emphasis added). As *Yakus* demonstrates, Congress does know how to make review exclusive when it so chooses. The Voting Rights Act provision cited, 42 U.S.C. Section 1973c, applies to declaratory judgment actions filed by states or political subdivisions and is not at all analogous to the instant case. By whatever method a right to judicial review exists, that right must be substantial, adequate and truly available. If the right is illusory, it does not exist. *Wadley Southern R. Co. v. Georgia*, 235 U.S. 651, 661 (1915).

CONCLUSION

There is no conflict in the circuits and the dearth of litigation on the questions presented indicates that review in this case would be, at best, premature. The decision of the court of appeals is a conventional application of a well-established rule of statutory construction which permits full access to federal court review by aggrieved parties, regardless of their size, power or geographic location. The construction of the statute by the court of appeals is well reasoned and avoids serious constitutional questions inherent in the Petitioners' position. The Petitioners would permit enforcement of presumptively arbitrary, capricious and otherwise inconsistent with law regulations solely because of a party's inability to take advantage of a totally unrealistic and effectively unavailable forum for review. The court of appeals correctly rejected this extreme position.

The Petition for a Writ of Certiorari should be denied.

CRITCHFIELD, CRITCHFIELD,
CRITCHFIELD & JOHNSTON
J. C. JOHNSTON III
J. DOUGLAS DRUSHAL
Counsel of Record
Counsel for Holmes Limestone Co.
CHESTER, HOFFMAN & WILLCOX
ROBERT D. ZITKO
Counsel of Record
Counsel for Ohio Mining and Reclamation Association

April 21, 1982